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RESEARCH ARTICLE



Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change

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ABSTRACT

This contribution explores how climate-vulnerable states can effectively use the law to force action in order to address loss and damage from climate change, taking the Pacific Island state of Vanuatu as an example. Vanuatu made headlines when its Minister of Foreign Affairs, International Cooperation and External Trade, the Hon. Ralph Regenvanu, announced his government's intention to explore legal action as a tool to address climate loss and damage suffered in Vanuatu. Our contribution places this announcement in the context of Vanuatu's own experience with climate loss and damage, and the state's ongoing efforts to secure compensation for loss and damage through the multilateral climate change regime. We then discuss the possibilities for legal action to seek redress for climate loss and damage, focusing on two types of action highlighted in Minister Regenvanu's statement: action against states under international law, and action against fossil fuel companies under domestic law. After concluding that the issue of compensation for climate loss and damage is best addressed at the multilateral level, we offer proposals on how the two processes of litigation and negotiation could interact with each other and inspire more far-reaching action to address loss and damage from climate change.

Key policy insights

- The review of the Warsaw International Mechanism for Loss and Damage offers an opportunity to start putting in place a facility for loss and damage finance under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC).
- A climate damages tax (CDT) on fossil fuel companies seems a particularly promising option for mobilizing loss and damage finance. Such a CDT could be one revenue stream for a relevant loss and damage facility.
- Legal action – including cases against foreign states or fossil fuel companies – could bolster the position of climate-vulnerable states in multilateral negotiations on loss and damage finance.

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Introduction

This contribution explores how climate-vulnerable states such as the Pacific Island state of Vanuatu can effectively use the law to forge action to address loss and damage. Vanuatu made headlines when its Minister of Foreign Affairs, International Cooperation and External Trade, the Hon. Ralph Regenvanu, announced the Government of Vanuatu's intention to explore legal action against the fossil fuel industry, and the states that sponsor it, for climate change-related loss and damage the state had suffered (Republic of Vanuatu, 2018c). This announcement must be seen in the context of the severe loss and damage already suffered in Vanuatu and across the globe due to climate change, accompanied by the failure of the multilateral climate change

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regime to provide compensation for such loss and damage. While compensation has been an extremely controversial issue at the international climate change negotiations (Pekkarinen, Toussaint, & Van Asselt, 2019; Roberts & Huq, 2015), it is based on climate justice imperatives that are widely recognized in the literature (Burkett, 2014; Farber, 2008; Tschakert, Ellis, Anderson, Kelly, & Obeng, 2019; Vanhala & Hestbaek, 2016; Wallimann-Helmer, 2015; Warner & Zakieldeen, 2011). The call for compensation for loss and damage is also supported by well-established rules and principles of international law, including the right to reparations for injury resulting from violations of international law (Hafner-Burton, Victor, & Lupu, 2012; Wewerinke-Singh, 2019).

In line with the Intergovernmental Panel on Climate Change (IPCC)'s Special Report on Global Warming of 1.5°C, we understand climate loss and damage broadly as harms from (observed) impacts and (projected) risks associated with future climate change (IPCC, 2018, Glossary, p. 553). However, unlike the IPCC (2018), but in line with the Paris Agreement (2015) and other relevant documents that form part of the international climate change regime under the United Nations Framework Convention on Climate Change (UNFCCC), we do not distinguish the political debate on Loss and Damage (capitalized letters) from physical losses and damages (lowercase letters) at the definitional level, and use the term 'loss and damage' to refer to both. We conceptualize compensation as 'something, typically money, awarded to someone in recognition of loss, suffering or injury' (Oxford Living Dictionary, 2018). We refer to Vanuatu as a useful illustrative case that has lessons for other climate-vulnerable states seeking to catalyze meaningful global action on loss and damage, including compensation.

Vanuatu's submission to the Executive Committee of the Warsaw International Mechanism (WIM) for Loss and Damage of the UNFCCC on loss and damage finance provides an indication of the range of activities that could be covered by compensation for loss and damage: costs of relocation due to sea-level rise for coastal communities; costs for climate resilient reconstruction after extreme weather events; social and gender protection measures; livelihood safety net programmes for the most vulnerable; livelihood transformation programmes; pro-poor micro insurance, crop insurance and/or insurance premium subsidies at various levels; national and local level emergency finance reserves or contingency funds; contingency planning and comprehensive risk management particularly at the local level; capacity and institution building at all levels; and technology cooperation and transfer, such as loss and damage assessment tools (Republic of Vanuatu, 2018a). This wide range of activities illustrates that compensation for loss and damage would need to address both quantifiable damages and intangible, non-economic losses (Tschakert et al., 2019).

Vanuatu's experience with various types of loss and damage is discussed in the first part of the article, which serves to illustrate the urgency of the issue and the necessity of international cooperation to address it. Vanuatu's attempts to secure compensation for loss and damage through multilateral negotiations are discussed in the second part, while the third part highlights the problems of moving the negotiations forward on this issue. The fourth part discusses the possibilities for legal action to seek redress for loss and damage, focusing on the two types of action highlighted in Minister Regenvanu's statement: action against states under international law, and action against fossil fuel companies under domestic law. The conclusion then brings the different lines of analysis together and leads us to make proposals as to how the two processes of litigation and negotiation could interact with each other and inspire more ambitious action to address loss and damage.

Vanuatu's experience with loss and damage

Vanuatu is composed of 82 islands that are mostly of volcanic origin, 65 of which are inhabited by people.¹ Its population of around 272,000 depends mainly on agriculture and fishing for subsistence (Vanuatu National Statistics Office (VNSO), 2017). The UN categorizes Vanuatu as a Least Developed Country (LDC), largely due to its being one of the most geo-physically vulnerable countries in the world (Garschagen et al., 2015; UN Department of Economic and Social Affairs, 2010). Vanuatu is located in the 'Pacific Rim of Fire', experiencing moderate earthquakes almost every other day, and regular eruptions from more than a dozen active volcanoes (Vanuatu Metrology and Geo-Hazards Department [Vanuatu Meteo], 2017). The archipelago also falls within the South Pacific tropical cyclone basin and is subject to frequent cyclones, tsunamis, storm surges, drought, flooding of both coasts and rivers, and landslides (Pacific Catastrophe Risk Assessment and Financing Initiative

[PCRAFI], 2011). The state's geographical vulnerability is exacerbated by low levels of economic development and institutional capacity (Global Facility for Disaster Reduction and Recovery [GFDRR], 2009). From 2011 to 2015, Vanuatu was ranked as the world's most vulnerable nation to natural disasters on the World Risk Index (Garschagen et al., 2015). Under the UNFCCC regime, Vanuatu qualifies as 'particularly vulnerable to the adverse effects of climate change' due to its status as a 'small island country' (UNFCCC, preamble).

Vanuatu has seen an increase in the frequency and intensity of extreme weather events due to climate change (GFDRR, 2009; Government of Vanuatu, 2018a). It is expected that natural disasters and extreme weather events will intensify even further as temperatures continue to rise (GFDRR, 2009). Climate modelling for Vanuatu has predicted increased average temperatures and an increase in the frequency of extreme temperatures; both greater precipitation and a higher number of dry days during the rainy and dry season respectively; sea level rise; and coastal erosion (Vanuatu Meteo, 2017). The complex and damaging interaction between climate change impacts contributed to the destructive capacity of category five Cyclone Pam, which struck Vanuatu in March 2015. Cyclone Pam was the largest ever recorded in the South Pacific, until Cyclone Winston which hit Fiji the following year (Sopko & Falvey, 2015). At least 16 people lost their lives as a result of Cyclone Pam (Australian Broadcasting Cooperation, 2015), while approximately 65,000 people (roughly one quarter of the population) were displaced by the disaster. The Government of Vanuatu estimates that some 17,000 buildings were damaged or destroyed (Esler, 2015). The destruction and subsequent economic losses totalled approximately US\$450 million, or roughly 64% of GDP (Vanuatu Meteo, 2017). The impact of the disaster was amplified by a subsequent drought associated with the unusually strong 2015–2016 El Niño event, the intensity of which has also been linked to climate change (Cho, 2016).

The extended impact of the disaster demonstrates how climate events undermine economic and social development and can lead to poverty traps (Heltberg, Siegel, & Jorgensen, 2009). As New Zealand's Prime Minister Jacinda Ardern witnessed personally when visiting Vanuatu in March 2018, some Ni-Vanuatu schoolchildren still attend class in tents because the school buildings damaged by the storm were neither replaced nor repaired (Ardern, 2018). Some children have dropped out of school altogether. The extent of the disruption to Vanuatu's economy and society has caused its graduation from LDC status, scheduled for December 2017, to be postponed until December 2020 (UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, 2018). Minister Regenvanu, lamented in his high-level statement to the 24th Conference of the Parties (COP24) to the UNFCCC in Katowice, Poland, in 2018 that the adverse effects of climate change leave Vanuatu in a permanent state of emergency (Government of Vanuatu, 2018b).

Vanuatu will almost certainly suffer additional large-scale and devastating losses and damages as temperatures continue to rise. According to PCRAFI (2011), Vanuatu is expected to incur, on average over the long term, losses of US\$48 million per year due to tropical cyclones and earthquakes, which is equivalent to 6.6% of Vanuatu's GDP. PCRAFI (2011) further estimates that Vanuatu has a 50% chance of experiencing a loss exceeding US\$330 million and casualties larger than 725 people from a single event in the next 50 years. These numbers do not yet account for loss and damage resulting from slow-onset climate disasters such as drought or coastal erosion, or complex interactions between different types of impacts. More research is needed to better understand the severity and nature of the risks of future loss and damage for Vanuatu under different climate scenarios. However, it is clear from Vanuatu's experience with Cyclone Pam that the costs of future loss and damage will far exceed the nation's coping capacities. This is even more so if the costs of preventing and addressing non-economic loss and damage – such as the loss of traditional knowledge or distinct ways of life – are also taken into account. Vanuatu has therefore intensified its efforts to acquire loss and damage finance from international sources through the multilateral loss and damage regime.

Vanuatu's role in the emerging multilateral loss and damage regime

Vanuatu's efforts to secure compensation for the damaging consequences of climate change started when the UNFCCC was negotiated. At the Intergovernmental Negotiating Committee, the body established by the UN

General Assembly (UNGA) to negotiate the UNFCCC, the Alliance of Small Island States (AOSIS) chaired by Vanuatu's ambassador Robert Van Lierop put forward a proposal in 1991 to establish an international fund and insurance pool based on the polluter pays principle. The proposal explained how '[t]he resources of the insurance pool should be used to compensate the most vulnerable small island and low-lying coastal developing countries for loss and damage resulting from sea level rise' (AOSIS, 1991; Linnerooth-Bayer, Mace, & Verheyen, 2003). Whilst the proposal was rejected by developed states, AOSIS did secure a reference to insurance in Article 4.8 of the Convention (UNFCCC, 1992). Similar language, including 'insurance', was included in Article 3.14 of the Kyoto Protocol (Kyoto Protocol, 1997).

It would take another fifteen years until the first reference to 'loss and damage' appeared in a decision of the COP, entitled the Bali Action Plan (UNFCCC, 2007, para. 1(c)(iii)). The term has since appeared in numerous COP decisions, and in the name and mandate of the Warsaw International Mechanism on Loss and Damage (WIM) established in 2013. The WIM is mandated to undertake, inter alia, the function of '[e]nhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change' (UNFCCC, 2013, para. 5(c)). As Vanhala and Hestbaek explain, it was the ambiguity of the 'loss and damage' framing that unlocked progress in the negotiations on the issue (Vanhala & Hestbaek, 2016). On the one hand, the lack of a reference to either 'liability' or 'compensation' accommodated developed states' concerns about their potential liability for the consequences of climate change (Huq, Roberts, & Fenton, 2013; Roberts & Huq, 2015). On the other hand, developing states saw a breakthrough in the establishment of a process to address loss and damage from climate change (Roberts & Huq, 2015). A specific victory for Vanuatu and other developing states was the inclusion of a reference to 'recovery and rehabilitation' as one method to remedy loss in the initial two-year workplan of the WIM Executive Committee adopted at COP20 in Lima in 2014 (UNFCCC, 2014, p. 10), and in its five-year rolling workplan adopted at COP23 in Bonn in 2017 (UNFCCC, 2017a).

The 2015 Paris Agreement sharpened the edges of the emerging multilateral loss and damage regime. Emboldened by demands from Pacific civil society, Vanuatu, alongside other developing states, had advocated for the inclusion of a standalone article on loss and damage in the Paris Agreement that would also 'anchor' the WIM, or a new mechanism with a broader mandate, into the climate change regime (SPREP, 2015). This was achieved through what is now Article 8 of the Paris Agreement, which provides the WIM with a durable legal basis while allowing for its enhancing and strengthening (Paris Agreement, 2015). Further, paragraph 3 of Article 8 explicitly directs parties 'to enhance understanding, action and support' to address loss and damage. However, the latter provision lacks an explicit link to the financial mechanism of the Convention; this omission creates uncertainty about whether loss and damage is eligible for funding from the UNFCCC's main climate fund, the Green Climate Fund (GCF) (Siegele, 2018). Developed states' resistance to the inclusion of a provision on loss and damage in the Paris Agreement, combined with developing states' eagerness to find a workable compromise (Hoffmaister, Talakai, Dampney, & Barbosa, 2014) resulted in another important limitation of the emerging regime. This limitation is reflected in paragraph 52 of the decision accompanying the Paris Agreement, which stipulates that 'Article 8 of the Agreement does not involve or provide a basis for any liability and compensation' (UNFCCC, 2015a). As this paragraph is important to understanding the relationship between negotiations and litigation, and Vanuatu played an important role in negotiating it, it is worth unpacking its origins and implications.

When considering the origins of paragraph 52, a key point to note is that the scope of the provision is narrower than what was initially proposed by its main architect, the US. The US had wanted to exclude liability and compensation from the scope of the international climate change regime altogether (Calliari, 2018; Pekkarinen et al., 2019). Text reflecting this desire appeared in a 'Draft Paris Outcome' prepared by the French COP Presidency towards the end of the negotiations in Paris, which suggested a treaty provision on loss and damage of which the third and final paragraph would have read as follows:

Parties shall enhance action and support, on a cooperative and facilitative basis, for addressing loss and damage associated with the adverse effects of climate change, and in a manner that does not involve or provide a basis for liability or compensation nor prejudice existing rights under international law. (UNFCCC, 2015b)

The inclusion of this clause within the Paris Agreement itself would have meant that liability and compensation could only have been introduced (or re-introduced, depending on one's perspective) into the international climate change regime through a formal treaty amendment, which would be an extremely cumbersome process with negligible chances of a successful outcome. The provision in the Presidency's Draft Outcome therefore crossed Vanuatu's red lines as well as the red lines of a number of other states, including other Small Island Developing States (SIDS) in AOSIS and members of the African Group. To address this issue, Vanuatu's head of delegation arranged an emergency meeting with the Presidency during the final hours of the conference to indicate that Vanuatu would be unable to join consensus on the Paris Agreement if the proposed clause were included in the treaty text. The clause was abandoned. The paragraph that was eventually included in decision 1/CP.21 was an acceptable (though still undesirable) compromise for Vanuatu (Mace & Verheyen, 2016; Wewerinke-Singh & Doebbler, 2016).

The implications of the exclusion of liability clause in decision 1/CP.21 are not as sweeping as they may at first appear. A first point to underscore is that, unlike the exclusion of liability clause contained in decision 1/CP.21, the broadly-drafted language of Article 8 of the Paris Agreement cannot be altered without a formal treaty amendment. Secondly, despite the clause contained in decision 1/CP.21, the mandate of the WIM is still 'broad enough to encompass many of the concerns addressed by what has been termed "compensation"' (Mace & Verheyen, 2016, p. 210). Indeed, the WIM Executive Committee's five-year rolling workplan adopted in 2017 explicitly states that it will implement the WIM's function of '[e]nhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change' (UNFCCC, 2017a). The five-year rolling workplan also contains a strategic workstream focused on enhancing cooperation and facilitation in relation to this function (UNFCCC, 2017a). Moreover, as Lees (2017) explains, the exclusion of liability clause leaves open the possibility of assigning legal responsibility for loss and damage under the international climate change regime. Herein lies much of the untapped potential of the WIM: the development of a responsibility allocation mechanism would enable states 'to utilize this mechanism to transfer their own responsibilities onto private actors' (Lees, 2017, p. 68).

A final point to mention is that upon signing the Paris Agreement, Vanuatu – along with a number of other climate-vulnerable states – made a formal declaration stating that 'ratification of the Paris Agreement shall in no way constitute a renunciation of any rights under any other laws, including international law' (Republic of Vanuatu, 2018b). This declaration reaffirms the entitlement of climate vulnerable states to pursue compensation for climate loss and damage through legal action outside the UNFCCC process (Pekkarinen et al., 2019). It is worth recalling that several SIDS had already made a similar declaration under the UNFCCC (1992) and the Kyoto Protocol (1997). The potential importance of legal action to address loss and damage has increased since the adoption of the Paris Agreement, as some developed states are deliberately blocking the operationalization of the regime in relation to loss and damage finance (Pekkarinen et al., 2019). This situation and its implications are discussed in the following section.

The intensifying battle over loss and damage finance

While negotiations on loss and damage give the appearance of some progress at nearly every COP (and some intersessionals), the overall picture since Paris is one of stagnation. At COP23 in 2017, Vanuatu and most other developing states made a strong call for new and additional finance for loss and damage, and suggested the inclusion of a permanent item on loss and damage in the agenda of the subsidiary bodies. Developed states opposed both proposals, with the US arguing with renewed vigour against the operationalization of the loss and damage regime (Benjamin, Thomas, & Haynes, 2018). The parties eventually reached a compromise in calling for a one-off 'expert dialogue' to explore how loss and damage finance may be mobilized and secured (UNFCCC, 2017b).

In the run-up to the expert dialogue, branded the 'Suva Expert Dialogue on Loss and Damage' by the Fijian COP23 Presidency, Vanuatu's Minister Regenvanu started advocating in public for a 'climate damages tax' (CDT) on fossil fuel companies. Minister Regenvanu first made a call for a CDT at a meeting of Commonwealth Heads of Government in London in April 2018 (Darby, 2018), followed by the publication of several co-authored opinion

pieces in popular online outlets (Isaac, Jumeau, Mahmud, & Regenvanu, 2018; Regenvanu & Persaud, 2018). According to Minister Regenvanu and Persaud (2018), a CDT is based on the rationale that

[The fossil fuel industry] has spent decades fueling climate denial while making profits. In 2017 alone, the top six oil companies made \$134 billion in profit. ... We will only stop climate change by making those who contribute to it pay for it. ... We need to end the mismatch between those who gain and those who lose.

NGOs supporting this rationale have defined CDT as 'a charge on the extraction of each tonne of coal, barrel of oil, or cubic litre of gas, calculated at a consistent rate globally based on how much climate pollution (CO₂e) is embedded within the fossil fuels' (Richards, Hillman, & Boughey, 2018, p. 3). The proposed CDT would also see the royalties paid to states by fossil fuel companies channelled to a loss and damage facility managed by the GCF (Richards et al., 2018). This would be beneficial in anchoring loss and damage finance in the overarching framework of the UNFCCC's financial mechanism to minimize the complexity of accessing climate finance (Republic of Vanuatu 2018a).

A crucial aspect of the proposal is that developed states are not asked to provide finance from public sources to compensate climate-vulnerable states for loss and damage, but instead to adopt legislation that would make it mandatory for private actors from the fossil fuel industry to provide such compensation (Frumhoff, Heede, & Oreskes, 2015). However, when the proposal was put forward by developing states and observers at the Suva Expert Dialogue in May 2018 (UNFCCC, 2018a), it was opposed by developed states (Singh, 2018). At COP24, parties merely welcomed the report of the Suva Expert Dialogue and encouraged the WIM's Executive Committee '[t]o seek ways to continue enhancing its responsiveness, effectiveness and performance in implementing activities in its five-year rolling workplan, particularly those under [the workstream on action and support]' (UNFCCC, 2018b). Moreover, parties failed to expressly acknowledge Article 8 alongside mitigation and adaptation in the 'rulebook' of the Paris Agreement. As Pekkarinen et al. (2019, p. 36) note, this was 'a missed opportunity' and 'further contributes to the confusion surrounding the differences between adaptation and loss and damage'.

At the time of writing, an important contribution to the loss and damage finance discussion is expected in the form of a technical paper which the secretariat is mandated to prepare as an input to the review of the WIM at COP25 in 2019. This paper is to identify the sources of financial support for addressing loss and damage as well as the modalities for accessing such support (UNFCCC, 2018b). The results of the Suva Expert Dialogue, including the proposal for a CDT, will be used to inform this paper. Thus, the paper has the potential to inform substantive negotiations about the proposal. At the same time, the review of the WIM provides an opportunity to start a process to provide this body with the envisaged financial arm (Pekkarinen et al., 2019; Richards et al., 2018). However, the political dynamics around loss and damage finance warrant skepticism about the prospects for progressing these proposals through the climate negotiations (Benjamin et al., 2018). Against this backdrop, it is urgent to understand how legal action could help to change the dynamics and potentially contribute to a comprehensive multilateral agreement on loss and damage with enforceable provisions on climate finance.

Legal action to pursue compensation for climate loss and damage

At the Climate Vulnerable Summit in November 2018, Minister Regenvanu announced his government's intention to explore legal action against the corporations and governments profiting most from products causing climate change, stating that it was

exploring all avenues to utilize the judicial system in various jurisdictions – including under international law – to shift the costs of climate protection back onto the fossil fuel companies, the financial institutions and the governments that actively and knowingly created this existential threat to Vanuatu. (Republic of Vanuatu, 2018c)

Legal action under international law is premised on substantive obligations relevant to climate change derived from the law of nations. This form of legal action has been contemplated by climate-vulnerable states for nearly two decades. In 2002, Tuvalu's then Prime Minister Koloa Talake announced that Tuvalu was considering bringing a contentious case against Australia and the US for their alleged failure to address global warming. Subsequently, the then Tuvaluan Minister of Finance, Bikenibeu Paeniu tried to build a coalition of SIDS from the

Pacific, the Indian Ocean and the Caribbean to join Tuvalu in the planned lawsuit (Jacobs, 2005; Reuters, 2002). However, the initiative was dropped following a change of government in Tuvalu. Nearly ten years later, in 2011, the then President of Palau, Johnson Toribiong, called on the UNGA to

seek, on an urgent basis ... an advisory opinion from the International Court of Justice on the responsibilities of states under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other states. (Hurley, 2011)

This initiative was dropped as well, reportedly due to threats of reprisal by the US with which Palau has close ties under a Compact of Free Association (Brown, 2013; Burkett, 2013).

In addition to likely opposition from powerful states, there are, not surprisingly, several legal obstacles to successful climate litigation before an international body such as the International Court of Justice (ICJ). These include finding a suitable forum; identifying relevant substantive obligations and various challenges relating to attribution, causation and evidence. These obstacles are not inherently insurmountable (Rajamani, 2015, p. 19; Verheyen, 2005; Wewerinke-Singh, 2019) and legal action could be designed to circumvent at least some of them. Vanuatu could, for example, accept the compulsory *ipso facto* jurisdiction of the ICJ under Article 36, paragraph 2 of the ICJ Statute and then bring a test case before the ICJ against one or more states that have done the same, which would include Australia but not the US. The case could focus on states' prevention obligations under the *lex specialis* of the UNFCCC, human rights law or customary international law. An alternative approach could be to revive Palau's earlier campaign for a UNGA resolution requesting the ICJ for an advisory opinion on climate change, or to seek an advisory opinion on loss and damage relating to marine ecosystems from the International Tribunal for the Law of the Sea (ITLOS) (Bodanksy, 2017; Sands, 2016).

The second type of legal action contemplated in Minister Regenvanu's statement focuses on the contribution of the world's largest investor-owned fossil fuel producers to loss and damage. Frumhoff et al. (2015) identify four reasons why these so-called 'carbon majors' carry significant responsibility for climate change. Firstly, their products are responsible for a large share of the anthropogenic greenhouse gas emissions accumulated in the global atmosphere. Secondly, they continued to produce these products despite recognition of the danger by scientists and policy-makers. Thirdly, they have systematically undermined political action on climate change mitigation, including through the promotion of misinformation. Finally, they continue to work towards the expanded production and use of fossil fuels for decades to come. This multi-faceted responsibility has inspired a growing number of legal cases against the carbon majors brought in domestic courts around the world, notably including suits brought by cities and local governments on behalf of their citizens (Ganguly, Setzer, & Heyvaert, 2018). Plaintiffs in these cases are invoking a wide range of legal theories, ranging from public and private nuisance through to trespass (Burger & Wentz, 2018). While the outcomes of these cases are difficult to predict, the precedent of tobacco lawsuits illustrates that it is possible, at least in principle, for public authorities to recover billions of dollars from industry on behalf of their citizens (Ieyoub and Eisenberg, 2000).

In Vanuatu, a case against carbon majors could be premised on domestic tort law, with jurisdiction flowing from the fact that the claim involves harm that occurred (and is ongoing) within Vanuatu's borders (Gage & Wewerinke, 2015). A similar model has been used in a petition to the Commission on Human Rights of the Philippines, which instigated a National Inquiry on Climate Change to investigate the responsibility of 47 investor-owned carbon majors for human rights violations resulting from climate change. At the time of writing, the Commission was in the process of completing its recommendations from the inquiry (R. Cadiz, personal communication, March 4, 2019). While the Commission does not have the power to produce binding orders, the process itself has already contributed to enhanced accountability of the actors most responsible for climate change and recognition of its human rights consequences (Savaresi, Hartmann, & Cismas, 2019).

Vanuatu does not, as yet, have its own national human rights institution with a mandate to conduct a similar inquiry. However, it does have an independent and highly regarded judicial system that could potentially deal with a claim for climate damages against carbon majors. The chances of obtaining a favourable judgment or even a settlement in such a case are regarded as highly uncertain, as climate litigation against fossil fuel companies comes with its own significant hurdles. These include the challenge of establishing causation between the defendants' conduct on the one hand and the specific damages asserted by Vanuatu on the other (Burger &

Wentz, 2018; Kysar, 2011), which is particularly difficult in connection with non-economic loss and damage (Tschakert et al., 2019). Nonetheless, this type of litigation could potentially offer Vanuatu a real chance to secure significant financial compensation for climate damages from those responsible for causing it.

Conclusion

Against the backdrop of increasingly severe loss and damage suffered in climate-vulnerable states on the one hand, and stagnating multilateral negotiations on the other, the potential of legal action focused on loss and damage is gaining renewed importance. Legal action is not an ideal strategy to address loss and damage: each legal initiative remains piecemeal, and as such does not substitute for a comprehensive and enforceable multilateral agreement on the issue. Moreover, each form of legal action comes with potentially significant risks and costs, such as the risk of creating an adverse precedent or facing reprisals from powerful corporate or government defendants. Nonetheless, Vanuatu and other climate-vulnerable states may consider that the potential benefits of legal action outweigh the risks, especially if those risks are mitigated through a carefully crafted case strategy and coalition-building.

As Peel and Osofsky (2015) point out, part of the added value of climate litigation consists in its capacity to produce public debate over difficult and controversial questions that are otherwise too easily swept under the carpet. To list but a few pressing questions that have been left unaddressed by the multilateral climate change regime: Which actors are primarily responsible for loss and damage from climate change, and what role should they play in addressing it? What is the standard for determining that specific loss and damage is attributable to anthropogenic climate forcings? How can uncertainty be addressed in this regard? What kinds of remedies could best restore the rights of those who suffer loss and damage from climate change? How should our laws and societies address climate-related irreversible loss? Given the global governance implications of these questions, they are best addressed at the multilateral level. However, litigation would allow Vanuatu and other climate-vulnerable states to expose these issues more openly, fully and forcefully. At the same time, it could provide individuals and communities with first-hand experience of loss and damage with an opportunity 'to be heard, accuse and explain' (Duffy, 2018, p. 51). Linking peoples' lived experiences of loss and damage with the question of responsibility through a legal case would almost certainly inspire a more meaningful international debate on loss and damage, and may even result in more ambitious action to prevent and address it.

State-based international litigation appears to have the greatest potential to influence the multilateral negotiations directly. Contentious cases can provide heightened exposure to the conduct of some (though not all) recalcitrant states, with the potential to result in a binding judgment that could include an order to make full reparations for injury suffered as a result of wrongful conduct (Wewerinke-Singh, 2019). Advisory opinions, while not binding, have the potential at least to clarify the rights and obligations of all states in connection with loss and damage (Rajamani, 2015). Increased clarity about states' rights and obligations could in turn bolster the position of climate-vulnerable states in international climate negotiations (Schwarte & Byrne, 2011). The influence of an international judgment or advisory opinion on climate change could extend to other areas of international law, including trade negotiations under the auspices of the World Trade Organization and international investment arbitration. Moreover, it could assist citizens, local governments and organizations around the world in holding recalcitrant states to account before regional and domestic courts (Bodansky, 2017; Schwarte & Byrne, 2011) which could in turn affect states' positions in the multilateral negotiations. Coalition-building is critical to avoid reprisals and, in case of an advisory opinion, to secure a majority of votes in the UNGA. In particular, those states which, like Vanuatu, made declarations reserving their rights under international law upon signing or ratifying the Paris Agreement are potential allies in crafting an effective strategy to address loss and damage through legal action.

Litigation against fossil fuel companies is another strategy that climate-vulnerable states could pursue in the quest for climate justice. Indeed, the filing of the first case against carbon majors by a sovereign nation would powerfully underscore the risks of mounting liabilities to which these companies have exposed themselves through their actions and omissions that contribute to climate change. Increased exposure to litigation for losses from climate change already appears to have motivated companies to reduce their emissions, and

institutional investors to divest from fossil fuel companies (United Kingdom Sustainable Investment and Finance Association and Climate Change Collaboration, 2018). Moreover, as Hunter (2009) points out, the exposure to litigation could ultimately inspire industry to promote a liability regime under the UNFCCC that would mitigate the risk of liability through a political compromise. In this way, litigation against carbon majors could indirectly address the lack of political will to address loss and damage on the part of the states where those corporations are headquartered.

In sum, this article has made clear that the question facing climate-vulnerable states is not whether, but how, to use the law to force meaningful action to address climate change-related loss and damage. Answering this question will require further deliberations amongst climate-vulnerable states that take account of their individual circumstances as well as their collective objectives in multilateral negotiations. Ultimately, a combination of legal initiatives and diplomacy may offer the greatest chances of catalyzing transformative change at the global level and obtaining much-needed reparations for actual climate harm.

Note

1. This section draws in part on Wewerinke-Singh and Van Geelen (2019).

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